

**NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT
AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE
RULES. See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24.**

FILED BY CLERK

JULY 30 2008

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	
)	
Respondent,)	2 CA-CR 2007-0323-PR
)	DEPARTMENT B
v.)	
)	<u>MEMORANDUM DECISION</u>
)	Not for Publication
ROBERT W. PARKER,)	Rule 111, Rules of
)	the Supreme Court
Petitioner.)	
)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20054688

Honorable Frank Dawley, Judge Pro Tempore

REVIEW GRANTED; RELIEF DENIED

Barbara LaWall, Pima County Attorney
By Jacob R. Lines

Tucson
Attorneys for Respondent

Isabel G. Garcia, Pima County Legal Defender
By Joy Athena

Tucson
Attorneys for Petitioner

ESPINOSA, Judge.

¶1 Pursuant to a plea agreement, petitioner Robert Parker was convicted of taking the identity of another, a class four felony, and child abuse, a class six undesignated offense. The trial court suspended the imposition of sentence; placed Parker on concurrent terms of probation, the longest of which was four years; and ordered him to pay restitution to various victims, only one of whom is the subject of this post-conviction proceeding (the “victim”). In his petition for post-conviction relief filed pursuant to Rule 32, Ariz. R. Crim. P., Parker challenged the \$37,500 restitution award he was ordered to pay for the victim’s lost income and argued in the alternative that trial counsel had been ineffective. The trial court summarily denied relief, and this petition for review followed. We review a trial court’s sentencing decision for an abuse of discretion. *State v. Reynolds*, 171 Ariz. 678, 683, 832 P.2d 695, 700 (App. 1992). In addition, we will not disturb a trial court’s denial of post-conviction relief absent a clear abuse of discretion. *State v. Watton*, 164 Ariz. 323, 325, 793 P.2d 80, 82 (1990). We find no abuse here.

¶2 Parker’s conviction for taking the identity of another arose from his having used the name and dental hygienist license of another individual without that person’s knowledge or consent to obtain employment as a dental hygienist. The victim was a dentist who had employed Parker, believing he was a licensed dental hygienist. The trial court conducted a restitution hearing following Parker’s guilty plea and ordered him to pay \$37,916 in restitution to the victim—\$37,500 for the victim’s lost income and \$416 for

insurance payments the victim was required to reimburse because Parker had provided services to patients in the victim's dental office as a non-licensed dental hygienist.

¶3 Pursuant to A.R.S. § 13-603(C), a trial court is required to order a convicted defendant to pay restitution to a victim for the full amount of the economic loss the victim sustained. Restitution should be ordered for a loss if: (1) it is economic, (2) it is one the victim would not have incurred but for the defendant's criminal conduct, and (3) it is directly caused by the criminal conduct. *State v. Wilkinson*, 202 Ariz. 27, ¶ 7, 39 P.3d 1131, 1133 (2002). Section 13-105(14), A.R.S., defines "economic loss" as follows:

[A]ny loss incurred by a person as a result of the commission of an offense. Economic loss includes lost interest, lost earnings and other losses which would not have been incurred but for the offense. Economic loss does not include losses incurred by the convicted person, damages for pain and suffering, punitive damages or consequential damages.

By their nature, restitution issues are highly fact-intensive. *State v. Ellis*, 172 Ariz. 549, 551, 838 P.2d 1310, 1312 (App. 1992). A trial court has "substantial discretion" in determining the facts necessary to impose restitution. *State v. Madrid*, 207 Ariz. 296, ¶ 5, 85 P.3d 1054, 1056 (App. 2004). However, a trial court may not impose restitution "for which there is no supporting evidence." *State v. Lindsley*, 191 Ariz. 195, 197, 953 P.2d 1248, 1250 (App. 1997).

¶4 Parker argues the trial court erred by awarding the victim damages for lost income incurred as a result of having cancelled patient appointments in order to address consequences flowing from Parker's conduct, including examining the files of those patients

Parker had treated, consulting with attorneys, and meeting with officials from the state dental board. Parker claims the lost earnings were consequential damages and thus did not qualify as an economic loss pursuant to § 13-105(14) and that, even if the victim had been entitled to compensation for lost income, he overstated the amount of his daily earnings. Parker also contends that, because the victim had intended to take a vacation during the week in question, he would not have earned any money during that time period in any event. In Parker's affidavit, attached as an exhibit to his petition for post-conviction relief, he attested, inter alia, that the victim's office was open only half-days on Fridays; it was his "understanding" the victim closed the office when he went on vacations, which typically lasted longer than a weekend; and the victim and the hygienists who worked for him performed certain types and numbers of dental procedures on a weekly basis, resulting in lower earnings than the amount the victim had claimed.

¶5 At the restitution hearing, the victim testified he had lost income at the rate of \$6,250 per day from July 22 through July 29, 2005, totaling \$37,500 for the six workdays involved. The victim stated he had been scheduled to be in the office seeing patients during that week but instead had "met with the state [dental] board extensively, [the] chief investigator extensively . . . [his] own attorney, malpractice attorneys, [and] personal injury attorneys." The victim testified he had been on the telephone dealing with the state dental board for "at least" fifteen hours during that week. The dental board had recommended he "seek legal counsel" to protect himself, a task that consumed approximately fourteen hours

of the victim's time. The victim testified he had elected to personally review the dental charts of the individuals Parker had treated rather than having an office manager assume that task because, he explained, "I'm the licensed dentist. I think it's incumbent upon me to do that." That task had taken "at least" fifty hours of his time. Defense counsel cross-examined the victim regarding his lost earnings and asked him, inter alia, for a detailed explanation of the basis for his claim, whether it was based on pre- or post-tax income, and whether he could have delegated to an employee some of the tasks he had assumed. Counsel also questioned the victim about a cancelled vacation, the cost of which the trial court did not award as restitution.

¶6 In denying Parker's petition for post-conviction relief, the trial court found, in part:

1. The loss of income was a direct economic loss to [the victim] caused by the Defendant's crime.

2. The amount ordered stemmed from [the victim's] testimony that his business averaged \$6250.00 per day and he lost six days['] income.

3. The documents now relied upon by the Defendant to challenge this amount, the survey of dental fees and the Defendant's affidavit, do not directly refute [the victim's] claim. Nor are they of sufficient weight to justify revisiting the restitution order with a new restitution hearing.

¶7 We find Parker's reliance on the *Wilkinson* decision misplaced. In that case, the supreme court found that damages caused by the unworkmanlike performance of an unlicensed contractor who had misrepresented himself as licensed did not directly arise from

the defendant's criminal conduct and were thus not compensable as restitution. *Wilkinson*, 202 Ariz. 27, ¶ 14, 39 P.3d at 30. In contrast, the restitution award here "bears a reasonable relationship" to the victim's lost income, which was a direct result of Parker's criminal conduct. *Lindsley*, 191 Ariz. at 197, 953 P.2d at 1250. The losses here did not result from additional causative factors; the victim would not have missed work but for Parker's conduct. *See State v. Guilliams*, 208 Ariz. 48, ¶ 19, 90 P.3d 785, 791 (App. 2004) (adopting "a case-specific, modified but for standard based on reasonableness"). Meeting with the dental board and conferring with counsel to assure that the victim's own dental license was not at risk were actions that were "unavoidably entwined in the criminal proceedings" and cannot be classified as consequential in nature. *Lindsley*, 191 Ariz. at 199, 953 P.2d at 1252.

¶8 In addition, we reject Parker's suggestion that the victim's lost earnings were consequential damages arising from the victim's "own inadequate investigation into Parker and his credentials, and [the victim's] concomitant fear that he would get in trouble with the Board of Dental Examiners." Again, those concerns would not have arisen but for Parker's criminal conduct, a fact the trial court expressly found when it denied the Rule 32 petition and concluded that "[t]he loss of income was a direct economic loss to [the victim] caused by Defendant's crime." As the court stated at the restitution hearing, "[I]t's a direct economic loss when some victim has to spend time going through records or working with investigators . . . to help figure out exactly what happened . . . [I]t's a loss of income that

would have come in.” *See In re Ryan A.*, 202 Ariz. 19, ¶ 28, 39 P.3d 543, 549 (App. 2002) (lost wages include compensation victim’s parent could have earned while attending disposition hearing).

¶9 Parker attached to his Rule 32 petition a survey of dental fees by the American Dental Association in an attempt to show that the victim had overstated his income and to support his argument that he is entitled to an evidentiary hearing pursuant to § 13-804(G) (if court lacks sufficient evidence to support restitution award, it may conduct hearing at which defendant may be called to testify). As the trial court noted in its ruling denying post-conviction relief, together the survey and Parker’s affidavit “[did] not directly refute” the victim’s claim, nor were they of “sufficient weight” to justify conducting a new hearing. The court apparently found the victim’s testimony sufficiently credible and persuasive to support the restitution award. Having considered the evidence Parker presented, the court was not persuaded that a new hearing was required, nor do we find the court abused its discretion in so ruling.

¶10 Parker alternatively argues that, even if the restitution award was proper, defense counsel was ineffective for failing to adequately cross-examine the victim regarding his earnings, his vacation plans, the tax consequences of his restitution claim, and details regarding the appointments he had cancelled. Parker did not file an affidavit from another attorney to support his claim of ineffective assistance of counsel, nor has he asserted with any specificity how the outcome would have changed if counsel had done everything he

suggests. The record supports the trial court’s finding that Parker “received competent representation at the restitution hearing from an experienced attorney who, among other things, cited the Court to the applicable law and successfully challenged a portion of the restitution sought by the victims.” Therefore, Parker’s ineffective assistance claim necessarily fails. *See Strickland v. Washington*, 466 U.S. 668, 693 (1984); *State v. Ysea*, 191 Ariz. 372, ¶¶ 15, 17, 956 P.2d 499, 504 (1998).

¶11 Accordingly, although we grant the petition for review, we deny relief.

PHILIP G. ESPINOSA, Judge

CONCURRING:

GARYE L. VÁSQUEZ, Judge

JOSEPH W. HOWARD, Judge